

REMARKS/ARGUMENTS

Reconsideration of this application, as amended, is respectfully requested.

**1. Rejection of claims 1 – 3, 7 – 14, and 17 – 19 as allegedly obvious under
35 USC 103(a).**

The Examiner has rejected claims 1 – 3, 7 – 14, and 17 – 19 as allegedly obvious under 35 USC 103(a), the claims being unpatentable over United States patent 5,222,099 of Goulette in view of United States published patent application US 2003/0168451 A1 of Bohrer. In particular, the Examiner has stated with respect to claim 1 as follows:

"With respect to claim 1, Goulette discloses a food container with a top and a bottom, being made of transparent polystyrene (Col 3, Line 49) but fails to teach the bottom being foam, thus only the cover being transparent. However, it is noted that Goulette discloses that the container can be made from other suitable materials, such as opaque polymers. Nonetheless, Bohrer teaches that a food container having a transparent cover and an opaque bottom is well-known in the art [0004]. Having the container as such provides a means of viewing the contents of the container. Therefore it would have been obvious to one of ordinary skill in the art at the time of the invention to configure the bottom of Goulette to be opaque as taught by Bohrer so as to provide a means of viewing the contents of the container."

With respect to claim 1, the Examiner has acknowledged that Goulette does not teach a food container with a transparent top and the bottom being foam. The Examiner then notes that Goulette discloses that the container can be made from other suitable materials, such as opaque polymers. The applicant respectfully submits that an opaque polymer as recited in the disclosure of Goulette is not a polymer foam. Rather, it is a solid single phase opaque polymer, without the second phase of gas in cells, of which a polymer foam consists. Nowhere in the specification or drawings of the Goulette reference is

there shown or suggested that any part of the container be made of polymer foam. Instead, Goulette teaches away from the use of foam at column 3, lines 44

– 49, stating as follows:

“It is presently preferred that nestable hinged container 10 be made of a thin gauge synthetic thermoplastic such as biaxially oriented transparent polystyrene (OPS). When OPS is employed, a gauge thickness on the order of about 8 mils to about 14 mils is known to provide suitable performance. Other clear or opaque plastics having the requisite strength and ease of processing may also be employed. Nestable hinged container 10 may be produced, as is preferred, utilizing a conventional thermoforming operation.”

Goulette refers the preferred material as being “thin gauge,” about 0.008 to 0.014 inches thick, and “having the requisite strength.” The applicant respectfully submits that if one were to use an opaque material, one would not use a foam material based upon the teaching of Goulette. If one were to use a thin gauge polymer foam bottom of between 0.008 to 0.014 inches in thickness, the container would surely not have “the requisite strength,” and hence the container would be rendered unsuitable for its intended purpose.

Turning to the reference of Bohrer, the Examiner notes that “Bohrer teaches that a food container having a transparent cover and an opaque bottom is well-known in the art [0004].” Additionally, in paragraph 0007, with respect to the thermoplastic material of the container, Bohrer teaches as follows:

“Thermoplastic material to be used are oriented thermoplastic materials, non-oriented thermoplastic materials, and combinations thereof. One preferred oriented thermoplastic material is oriented polystyrene. A preferred non-oriented thermoplastic material is polyethylene terephthalate or polystyrene. The first and second lengths of thermoplastic material can have different properties such as dissimilar thicknesses, different colors, differing barrier characteristics, among others. One preferred color combination is where first length of thermoplastic material is opaque and the second length of thermoplastic material is clear. In addition, the first and second lengths

of thermoplastic material are preferably each of a single-layer of thermoplastic material.”

Again, Bohrer only teaches opacity of the material, but nowhere does Bohrer show or suggest that the material be a polymer foam. Bohrer cites various properties of the material, but does not list thermal conductivity or thermal insulative capacity as a property, implying in any way the use of a foam.

The applicant notes that nowhere in Goulette or Bohrer, or in the other references cited by the Examiner is there shown or suggested any container, or a portion of the structure thereof, in which a polymer foam portion is hingably joined to a transparent polymer portion. Additionally, even if one were to consider a combination of references in which one reference includes a foam portion (as opposed to simply an opaque portion) and one reference includes a clear portion, the motivation to combine such references must come from such references themselves, and not the applicant's disclosure. MPEP § 2143 states:

To establish a prima facie case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations). The teachings or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, not in the applicant's disclosure. In re Vaeck, 947, F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991).

The applicant respectfully submits that the mere fact that prior art might be modified is not enough to make such modification obvious without more. The Supreme Court's decision in *Graham v. John Deere Co.* set forth the required factual analysis required to support a claim that the prior art suggested the

claimed invention. MPEP § 2141; 383 U.S. 1, 17, 148 USPQ 459, 467 (1966). The applicant respectfully submits that none of the three basic criteria for an obviousness rejection under 35 USC 103(a) have been met. There is no showing or suggestion of all of the limitations of claim 1, since nowhere do any of the references teach or suggest a container comprising a polymer foam bottom compartment hingably joined to a transparent polymer top cover, or even any polymer foam structure hingably joined to any transparent polymer structure. There is no motivation provided by the references to make any such modification to produce the claimed invention; and without any showing, suggestion, or motivation to combine references, there is no reasonable expectation of success.

It is respectfully submitted that absent these three criteria, the Examiner's rejection under 35 USC 103(a) is improper and should be withdrawn. It is also respectfully submitted that claim 1 is allowable.

It is further respectfully submitted that since claims 2 – 3, claims 7 – 14, and claims 17 - 19, being dependent upon claim 1 which is allowable, are also all allowable.

2. Rejection of claims 4 – 6 as allegedly obvious under 35 USC 103(a).

The Examiner has rejected claims 4 and 6 as allegedly obvious under 35 USC 103(a), the claims being unpatentable over United States patent 5,222,099 of Goulette in view of United States published patent application US 2003/0168451 A1 of Bohrer, and in further view of United States patent 3,937,389 of Wind.

The applicant respectfully submits that that none of the three basic criteria of a rejection under 35 USC 103(a) have been met in this rejection. There is no showing or suggestion of all of the limitations of claim 1 within the references of Goulette, Bohrer, and Wind, since nowhere do any of the references teach or suggest a container comprising a polymer foam bottom compartment hingably joined to a transparent polymer top cover, or any polymer foam structure hingably joined to any transparent polymer structure, further including first and second flaps joined by either adhesive or heat sealing. Additionally, there is no motivation provided by the references to make any such modification to produce the claimed invention.

In view of this and the additional foregoing remarks with regard to claim 1 under Item 1, the applicant respectfully submits that claims 4 and 6 being dependent upon claim 1, which is allowable, are also now both allowable.

3. Rejection of claim 5 as allegedly obvious under 35 USC 103(a).

The Examiner has rejected claim 5 as allegedly obvious under 35 USC 103(a), the claim being unpatentable over United States patent 5,222,099 of Goulette in view of United States published patent application US 2003/0168451 A1 of Bohrer, and in further view of United States patent 6,193,090 of Connors et al.

The applicant again respectfully submits that that none of the three basic criteria of a rejection under 35 USC 103(a) have been met in this rejection. There is no showing or suggestion of all of the limitations of claim 1 within the references of Goulette, Bohrer, and Connors et al., since nowhere do any of the

references teach or suggest a container comprising a polymer foam bottom compartment hingably joined to a transparent polymer top cover, or any polymer foam structure hingably joined to any transparent polymer structure, further including first and second flaps joined by ultrasonic welding. Additionally, there is no motivation provided by the references to make any such modification to produce the claimed invention.

In view of this and the additional foregoing remarks with regard to claim 1 under Item 1, the applicant respectfully submits that claims 5 being dependent upon claim 1, which is allowable, is also now allowable.

4. Rejection of claims 15 and 16 as allegedly obvious under 35 USC 103(a).

The Examiner has rejected claims 15 and 16 as allegedly obvious under 35 USC 103(a), the claims being unpatentable over United States patent 5,222,099 of Goulette in view of United States published patent application US 2003/0168451 A1 of Bohrer, and in further view of United States patent 5,046,659 of Warburton.

The applicant again respectfully submits that that none of the three basic criteria of a rejection under 35 USC 103(a) have been met in this rejection. There is no showing or suggestion of all of the limitations of claim 1 within the references of Goulette, Bohrer, and Warburton, since nowhere do any of the references teach or suggest a container comprising a polymer foam bottom compartment hingably joined to a transparent polymer top cover, or any polymer foam structure hingably joined to any transparent polymer structure, further including the top having a tab and the bottom having a hole for engagement with

the tab. The applicant notes that Warburton does not teach a tab and a hole, but rather a male rib engaging with a female recess. The latching structure of Warburton is not a tab engaging with a hole. Additionally, there is no motivation provided by the references to make any such modification to produce the claimed invention.

In view of this and the additional foregoing remarks with regard to claim 1 under Item 1, the applicant respectfully submits that claims 15 and 16 being dependent upon claim 1, which is allowable, are also now allowable.

CONCLUSION

In light of the foregoing arguments, the applicant respectfully submits that the Examiner has failed to make a case of prima facie obviousness in his rejections of claims 1 – 19. The applicant respectfully submits that all of claims 1 – 19 are allowable. The applicant respectfully requests reconsideration, and that a timely Notice of Allowance be issued in this case.

If for any reason the Examiner believes that a telephone conference might facilitate the prosecution of this case, he is respectfully requested to call Applicants' agent, John M. Hammond. The applicant encloses herewith a Petition for an Extension of Time in the amount of one month, with associated fee transmittal information. The applicant's agent has submitted a payment for this Extension of Time via an electronic funds transfer. The applicant believes that no additional fees are due. In the event that additional fees are due, the Patent Office is hereby authorized to charge such fees to the bank account provided by Mr. Hammond in this electronic funds transfer.

Respectfully submitted,

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